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Supreme Court, U.S.
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No. 01-662

In the

Supreme Court of the United States

OFFICE OF COMMUNICATION, INC.,
UNITED CHURCH OF CHRIST,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
& THE UNITED STATES OF AMERICA

and

MARYLAND/DISTRICT OF COLUMBIA/
DELAWARE BROADCASTERS ASSOCIATION, *et. al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY

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Petitioner, Office of Communication Inc., United Church of Christ ("UCC"), submits this reply to the arguments in opposition to the petition for a writ of certiorari made by the respondents, the United States and the State Broadcasters Associations ("Broadcasters"). We address their respective arguments below.

I. The Error of the Court of Appeals' Ruling is Not Negated by How Much of the Agency's Rule Is Left Standing

While agreeing with petitioner that the court of appeals erred in substantial respects in striking down the Federal Communications Commission's ("Commission") equal employment opportunity ("EEO") rules in a facial challenge, the United States nonetheless maintains that the decision does not warrant review by this Court. The United States would overlook the court of appeals' error, it seems, because the error was not complete -- it left standing, according to the United States, "the most important feature" of the rule, Option A, although the court refused to sever that part from Option B which it found to be unconstitutional. Brief for the Federal Respondents in Opposition ("U.S. Opp.") at 13. The United States states further that the Commission had contended throughout this litigation that it could satisfy its statutory EEO obligations through Option A alone. U.S. Opp. at 13, 17.

But these are resignations that do not negate the broad effects of the court of appeals' ruling outside its application to Option A, most particularly, the curtailment of the power of an agency to adopt rules and policies in accordance with its own judgment. It remains that after long-consideration and a lengthy rulemaking proceeding, the Commission determined that its statutory obligations could *best* be achieved by adopting *both* options. If the Commission were now to re-adopt Option A as the entire EEO rule, as the United States and Broadcasters suggest, it would not be the result of a policy choice made by

the Commission, but one imposed by the court of appeals.

Moreover, as UCC has maintained throughout this litigation, Options A and B together fail to satisfy the Commission's statutory obligation to ensure that radio spectrum services are available without discrimination on the basis of race or ethnicity. Brief for Appellant, on Petition for Review to the United States Court of Appeals for the District of Columbia Circuit, 00-1198 ("Petition for Review"). For more than three decades, the Commission believed that a policy of non-discrimination alone was insufficient to prevent the exclusion of minorities from broadcasting opportunities and had thus required affirmative outreach efforts directed at minorities. Petition for Writ of Certiorari, at 2-5. The Commission abandoned these requirements in the new rule without adequate justification or explanation. Petition for Review, at 25-38.[1]

II. A Decision Based Upon Erroneous Application of Law is Nonetheless Law and Binds Agencies Within the Jurisdiction

The United States asserts that review is not warranted for the further reason that the court of appeals' decision does not announce any broad principles of law, but merely misapplies settled standards to the particular facts of the case (U.S. Opp. at 13, 14), and that the Commission and future litigants might avoid the effects of the court's errors by distinguishing future cases on the facts. U.S. Opp. at 13, 17-21. Even accepting this assessment for the sake of argument, it remains that the decision in all its misapplication is law and immediately binds the Commission, as well as other federal agencies and litigants, until it is reversed. And in consequence of the important societal

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[1]Because the court of appeals declared the rule invalid on constitutional grounds, it dismissed UCC's petition for review as moot.

interests in orderly adjudication and evenhanded, consistent and predictable application of legal rules, it is not a simple thing for a court to depart from an earlier decision. Indeed, a litigant who asks a court to disavow one of its precedents bears a severe burden. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980); *see also United States v. Kanchanalak*, 192 F.3d 1037, 1038 n.1 (D.C. Cir. 1999)(absent a contrary decision of the Supreme Court or enactment of a controlling statute, a panel has no authority to overrule another panel; that power residing in the full court only). And the burden of overturning a ruling, as well as the burden of distinguishing the earlier case, is all the more difficult where the court has ruled not on the basis of a particular set of facts, but on hypotheticals and speculation as the court of appeals did here. U.S. Opp. at 14-15, 17. In the ordinary case, the problem of determining whether an earlier decision is on point and not factually distinguishable, involves not only the question of what the facts were in the preceding case, but also which of the facts of the earlier case were actually relied on by the court in deciding the case. Where the litigant is unable to make these determinations, for example, because the earlier court relied on hypotheticals, arguments and proofs will be presented without the litigant knowing how they will be used by the court, with the result that their essential value is determined only after the presentation has been closed. That is what occurred here. Can it be expected that in the next case, a panel of that court will not confound the litigant by relying upon new hypotheticals?

Furthermore, despite all of respondents' efforts to delimit the meaning and scope of the ruling, the court of appeals did announce broad principles of law. It declared that the collection of data on the race and ethnicity of job applicants is a race-conscious act and constitutionally suspect. Before this ruling, as the United States points out, (U.S. Opp. at 15), the Commission and other federal agencies had lawfully required regulated entities to collect such data, for the reason that

statistical imbalances as might be shown by such data are a means of identifying potentially discriminatory practices, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) and for ensuring compliance with non-discrimination requirements. *See* U.S. Opp. at 15 and citations therein.

It is true, as the United States asserts, that the court of appeals did not purport to reformulate the standards for facial challenges. U.S. Opp. at 17. Instead, the court of appeals ignored those standards laid down by the Court and employed standards of its own making. These too are new principles. That they are invalid as in conflict with the standards pronounced by the Court does not deny the fact of their adoption in the case at issue or prevent their application in future cases. Thus, rather than being *sui generis*, the court of appeals' ruling is controlling.

Moreover, it is not the case as the United States and Broadcasters assert, that merely because a lower court ruling involves a misapplication of principles of law, that review by writ of certiorari is not warranted. U.S. Opp. at 17; Brief in Opposition for the State Broadcasters Associations ("Broadcasters Opp.") at 9. On the contrary, in *Vermont Yankee Nuclear Power Corp. v. Nat'l Resources Defense Co. Inc.*, 435 U.S. 519, 525, 556 (1978), the Court granted review out of "concern that [the court of appeals] had seriously misread or misapplied ... statutory and decisional law..." and because the court "improperly intruded into the agency's decisionmaking process." *See also Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941 (2001)(certiorari granted to consider whether "the court of appeals misapplied the strict scrutiny standard"); *Yates v. Evatt*, 500 U.S. 391 (1991)(certiorari granted because the lower court "appeared to have applied the wrong standard ... and to have misread the record to which the standard was applied").

III. Respondent's Reading of Conflicting Circuit Court Opinions is Unduly Narrow

The United States asserts that the cases cited by petitioner as showing a conflict among the circuits on the issue of the constitutionality of recruitment efforts that specifically target racial or ethnic groups, are distinguishable. U.S. Opp. at 21-24. The United States' reading of the ruling at issue and of the cases cited by petitioner is too narrow. The court of appeals ruled that the requirement to collect data on the race and ethnicity of applicants would pressure licensees to recruit that way. App. 13a-14a. In the court of appeals' view "preferential recruiting" alone was suspect. App. at 13a. It was thus the loss of the opportunity to apply for a job, not to be hired, that the court of appeals identified as the unconstitutional denial, although in a footnote, it suspected and faulted the Commission for the purpose of increasing the number of minorities hired. App. 14a, n. ***.

The United States would distinguish *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998), on the basis that the plaintiffs there had not alleged facts that suggested "'a secret discriminatory standard, pattern of past practice, or motive' of distinguishing among applicants'" for housing under a federally subsidized housing program. U.S. Opp. at 22. But in *Raso*, the court found the government's "purpose to increase minority opportunities for apartments" to be "evident." 135 F.3d at 14. And even though achieving this purpose meant denying whites a statutory preference, the court upheld the plan, which also required affirmative efforts to attract minority, as well as majority applicants. *Id.* at 14, 16.

The United States would also distinguish *Raso* on the basis that in the ruling at issue here, the Commission could achieve its purposes through its life and death powers over licensees. U.S. Opp. at 22. But in *Raso*, there were similar powers in the government where it could withhold funding for

the construction of the housing project. 135 F.3d at 14.

While the plaintiff in *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997) alleged a denial of equal protection by the defendant's hiring of a "'substantially less qualified female applicant' because of her gender", *Id.* at 1032, he offered as evidence of discrimination a recommendation by the hiring panel that efforts be made to recruit minorities and women for the position. *Id.* at 1038. While the court found no indication that the defendant actually took steps to specifically recruit female candidates, it assumed that a jury could find that the defendant did recruit on that basis, but ruled that "[a]n employer's affirmative efforts to recruit minority, female applicants does not constitute discrimination." *Id.* at 1038-39, *citing Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1553-54 (M. D. Ala. 1995)("affirmative recruitment is a neutral measure") (interpreting *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994), *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994). The ruling was therefore in direct conflict with that of the court of appeals here.

In *Peightal v. Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994), in determining whether a "race-conscious" remedy was narrowly tailored to serve a compelling state interest, the court stated that "an initial inquiry should be undertaken to determine whether the ... government considered 'the use of race-neutral means to increase minority' participation. [*City of Richmond v. J.A.*] *Croson*, 488 U.S. [469] at 507...[1989]". The "race-neutral measures" identified by the court as having been considered were "high school and college recruiting programs providing information and soliciting applications from minorities and women, outreach programs spearheaded by existing minority employees, and the designation of a recruitment specialist to make presentations to apprise minorities and women of job opportunities. *Id.* at 1557-58. The courts in *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548,

1571 (11th Cir. 1994) and *Billish v. City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), made similar findings.

The relevant point from these cases is the characterization of the very measures complained of by the court of appeals here, as "race-neutral." Since race-conscious measures, even as remedies for past discrimination, are subject to strict scrutiny, whereas race-neutral measures are not, the United States' distinctions are not well-founded.

In *South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 935 F.2d 868 (7th Cir. 1991), while there was a First Amendment issue raised, as the United States asserts (U.S. Opp. at 23), the main claim by the plaintiff was a violation of the Fair Housing Act ("FHA"), 42 U.S.C. §3604, *et. seq.*, which prohibits, *inter alia*, discrimination in the sale or rental of housing on the basis of race or ethnicity. Just as the court of appeals here held as to the Fifth Amendment, the plaintiffs there maintained that the FHA prohibited the affirmative marketing of homes to persons of a particular race. *Id.* at 873. They argued that "the affirmative marketing plan further[ed] the goal of 'ending racially segregated housing' at the expense of limiting the 'availability of housing' for [persons of their race]." *Id.* at 882. The plan required race-conscious advertising by realtors to attract persons of the other race and the keeping of records indicating the race of persons shown homes. *Id.* 872, 873. But contrary to the court of appeals here, the Seventh Circuit ruled that it was not discriminatory to implement the plan where it did not exclude persons of the other race from housing opportunities. *Id.* at 883.

CONCLUSION

WHEREFORE, based upon the foregoing, petitioner prays that a writ of certiorari be issued for the review and reversal of the lower court decision and for a remand for a

consideration of those claims made by petitioner which were dismissed as moot by that court.

Respectfully submitted,

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